

STATE ATTORNEYS GENERAL

A Communication From the Chief Legal Officers of the Following States:

Maine • Massachusetts • New Jersey
Ohio • Rhode Island • Vermont

October 15, 2007

VIA FACSIMILE AND U.S. MAIL

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Regulation of Solid Waste

Dear President Bush:

We write to express our concern about a matter of great importance to the States – the preservation of our traditional state role in protecting public health, safety and welfare, and the environment with regard to solid waste facilities within our borders. Specifically, we are concerned with a policy position that the Office of Management and Budget (“OMB”) has taken in response to a senate bill, S.1789, *Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008* (“Bill”). We believe the policy position issued on September 11, 2007, is based on a misunderstanding of the traditional role that States have in regulating solid waste and the authority (or lack thereof) that the Surface Transportation Board has in this area. Therefore, we respectfully request that you direct OMB to reconsider this policy position.

In appropriating funds for the Surface Transportation Board (“STB”), a section of the Bill provides that the STB would not have jurisdiction over solid waste activities in matters involving a railroad. *See* Bill, sec. 191. In response, the OMB has stated that it “objects to allowing States to regulate solid waste stored along rail property, preempting authority granted to the Surface Transportation Board.” *Statement of Administration Policy*, OMB, at 3 (Sept. 11, 2007). This statement is incorrect, because no such preempting authority has been granted to the STB, and the Bill does not allow the States any authority to regulate solid waste that the States do not in fact already have.

Regulation of solid waste management is within the traditional police power of the States. The Supreme Court has long recognized that control over solid waste management is a legitimate

exercise of police powers to protect public health, safety, and the environment.¹ In enacting a federal law addressing solid waste disposal and management, Congress also recognized that the regulation of solid waste remains primarily the function of the States and has directed the United States Environmental Protection Agency to establish programs to encourage states to develop comprehensive plans to manage solid waste and to set criteria for landfills and other solid waste disposal facilities.²

While the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) gave the STB exclusive jurisdiction over railroads, ICCTA does not in fact give the STB any jurisdiction over the regulation of solid waste management.³ In fact, the STB and the federal courts have held that the mere fact that solid waste is being transported by rail does not give the STB jurisdiction over the handling or loading of the waste at a railroad.⁴ The STB has jurisdiction only over activities that are integrally related to rail transportation.⁵

Even in cases where an activity falls within the STB’s jurisdiction, both the STB and federal courts have held that ICCTA does not preempt all state regulation affecting transportation by rail. State and local safety codes and environmental regulations enacted to protect the public health and safety are not preempted.⁶ State regulation in this area is especially important where the STB has stated that it does not have licensing or approval authority over activities or facilities that are ancillary to a railroad’s operations.⁷ The STB’s lack of authority to regulate solid waste management and disposal would create a dangerous regulatory gap if the States are stripped of

¹ See, e.g., *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 320-24 (1905) (state and local agency had legitimate police power to determine what is the best or most appropriate method of protecting the public health in the matter of the disposal of the garbage); *Gardner v. Michigan*, 199 U.S. 325, 332-33 (1905) (same). See also *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. ___, 127 S. Ct. 1786, 1796, *slip op.* at 12 (2007) (waste management and disposal is typically and traditionally a state and local function).

² See Subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901(a)(4) and 6907.

³ See 49 U.S.C. §§ 10101-11908.

⁴ See *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ*, STB Finance Docket No. 34192 at 2-3, 6-7 (served Aug. 14, 2003) (STB does not have jurisdiction over the transloading of solid waste from trucks onto rail cars because the facility is not operated by a railroad; the facility’s use of railroad property to transload cargo does not give STB jurisdiction); and *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 299, 308-09 (3rd Cir. 2004) (same).

⁵ *Borough of Riverdale – Petition For Declaratory Order – The New York Susquehanna and Western Railway Corp.*, STB Finance Docket No. 33466, at 9 (served Sept. 10, 1999) (manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to STB jurisdiction or subject to federal preemption).

⁶ See *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971, at 8-9 (served May 1, 2001) (“*Boston and Maine*”); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (ICCTA is not a *per se* preemption provision).

⁷ See *Boston and Maine*, at 7 (automobile unloading facility is ancillary to rail transportation and does not require license from the STB); *New York City Economic Development Corporation – Petition for Declaratory Order*, STB Docket No. FD-34429, at 5-7 (served July 15, 2004) (STB approval is not required for construction of rail spur or switching track).

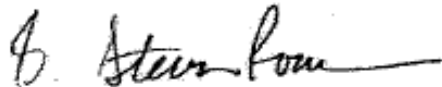
their sovereign powers to protect their citizens and the environment simply because the solid waste activities happen to take place on rail property. Moreover, even to the extent that the solid waste facilities fall within the STB regulatory authority (e.g. proposed as part of a larger project requiring prior STB approval), the STB does not have the experience, and has not been provided with the expertise or the resources to regulate the daily operations of such facilities and to pursue enforcement actions.

Given the States' traditional police powers in regulating solid waste management and the STB's lack of specific regulatory jurisdiction in this area, and to ensure responsible environmental protection, we urge that you direct OMB to reconsider the policy position it issued on September 11, 2007.

Very truly yours,

A handwritten signature in black ink, appearing to read "Martha Coakley".

Martha Coakley
Massachusetts Attorney General

A handwritten signature in black ink, appearing to read "B. Steven Rowe".

Steven Rowe
Maine Attorney General

A handwritten signature in black ink, appearing to read "Anne Milgram".

Anne Milgram
New Jersey Attorney General

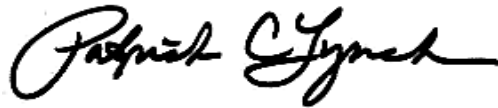
A handwritten signature in black ink, appearing to read "Marc E. Dann".

Marc E. Dann
Ohio Attorney General

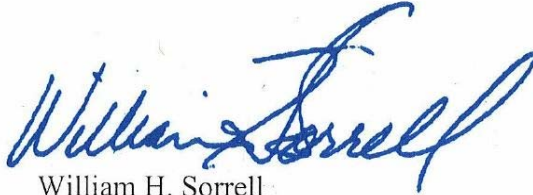
The Honorable George W. Bush

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Patrick C. Lynch
Rhode Island Attorney General



William H. Sorrell
Vermont Attorney General

cc: Senator Patty Murray, Sponsor of Senate Bill, S.1789
Senator Frank R. Lautenberg, Chairman of the Subcommittee on Surface Transportation
and Merchant Marine Infrastructure, Safety, and Security, U.S. Senate Committee on
Commerce, Science, and Transportation
Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials, U.S.
House Committee on Transportation and Infrastructure